1989

Shirley Gillmor v. Dennis K. Wright, Sara C. Wright, David L. Wright, Rona R. Wright : Brief of Appellant

Utah Supreme Court

Richard C. Skeen, R. Stephen Marshall; Van Cott, Bagley, Cornwall & McCarthy; D. Gilbert Athay; attorneys for respondents.
James B. Lee, John B. Wilson; Parsons, Behle & Latimer; attorneys for appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

SHIRLEY GILLMOR, as Personal Representative of the Estate of Stephen T. Gillmor, Plaintiff-Appellant, vs. DENNIS K. WRIGHT, SARA C. WRIGHT, DAVID L. WRIGHT, RONA R. WRIGHT, Defendants-Respondents, and CHARLES F. GILLMOR, EDWARD LESLIE GILLMOR, Intervenor-Defendants-Respondents.	)	No. 890257 Argument Priority: 14b

BRIEF OF APPELLANT SHIRLEY GILLMOR

On Appeal from the District Court of Summit County
Honorable Michael R. Murphy, District Judge

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PARTIES TO THE PROCEEDING

A complete list of all parties to the proceeding in the lower court is contained in the caption of the case upon appeal, with the exception of Summit County. Summit County was originally a defendant. The Complaint against Summit County was voluntarily dismissed by the plaintiff prior to trial.

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STATEMENT OF JURISDICTION AND NATURE OF THE PROCEEDINGS BELOW

This is an appeal from findings of fact and conclusions of law and a final judgment entered following trial in the Third Judicial District Court of Summit County. Jurisdiction is premised upon Utah Const., Art. VIII, § 3; Utah Code Ann. § 78-2-2 (1953); and Rule 3 of the Rules of the Utah Supreme Court.

STATEMENT OF THE ISSUES

Whether the lower court erred in denying to plaintiff Shirley Gillmor a private easement of access across the property of defendants to her own property for persons who had purchased permits to hunt big game there, and whether plaintiff is entitled to injunctive relief and damages.

DETERMINATIVE LEGISLATION

There is no constitutional provision or legislation believed to be determinative.

STATEMENT OF THE CASE

This case was filed by Stephen Gillmor against the Wright defendants to establish a private easement of access for big game hunters on a road from Interstate 80 in Echo Canyon, across property owned by the Wrights, to property owned and

leased by Stephen Gillmor at the head of Sawmill Canyon, Summit County, Utah. In September, 1986, Judge Billings heard plaintiff's motion for temporary restraining order to enjoin interference by defendants with plaintiff's use of the road. Plaintiff's motion was denied. In September, 1987, Judge Wilkinson heard and denied plaintiff's motion for preliminary injunction. Charles Gillmor and Edward Leslie Gillmor then intervened as defendants in the litigation and, in their counterclaims alleged, among other things, a right to reform a decree of partition entered by the Third District Court in 1981 which partitioned the Sawmill Canyon property and other property among Charles Gillmor, Edward Leslie Gillmor and Florence Gillmor, the last being Stephen Gillmor's predecessor-in-interest. Stephen Gillmor passed away and was succeeded as plaintiff by his wife, Shirley Gillmor. The matter went to trial in September, 1988, on both the issue of the private easement of access originally raised by Stephen Gillmor, and on the issue of reformation of the partition decree. Judge Murphy entered findings of fact and conclusions of law and a judgment dismissing both Shirley Gillmor's complaint and the counterclaim of Edward Leslie and Charles F. Gillmor. This appeal is from Judge Murphy's dismissal of Shirley Gillmor's complaint. The findings and conclusions to which plaintiff takes exception are Finding of Fact No. 17 and

Conclusions of Law Nos. 3, 4, 5 and 8. (Addendum "C".) The defendants and intervenor-defendants have filed cross-appeals.

STATEMENT OF FACTS

This lawsuit concerns real property owned by the parties around Sawmill Canyon, Summit County, Utah. Sawmill Canyon is east of Echo, Utah on Interstate 80. The canyon contains an unimproved, dirt road which leaves the I-80 frontage road and runs north, first crossing the property owned by the Wright defendants and then entering the property owned by the Gillmor parties. (See Map, Addendum "A".)

Prior to 1982, the Gillmor Sawmill property, together with property elsewhere in the state, was owned by Florence Gillmor, Edward Leslie "Bud" Gillmor and Charles F. "Frank" Gillmor as tenants in common. In 1982, the Third District Court of Salt Lake County entered an order which partitioned all of the Gillmor property, including the Sawmill property. (Finding of Fact No. 7.) The southern quarter of the Sawmill property was awarded to Frank Gillmor. The next quarter to the north was awarded to Bud Gillmor. The upper one-half of the property was awarded to Florence Gillmor. (See Map and Partition Decree, Exhibits 1P and 2P.)

The Sawmill Canyon Road, then, leaves the I-80 frontage road and travels north across the property of the Wright defendants, the property of Bud Gillmor, the property of Frank Gillmor and on to the property awarded to Florence Gillmor. (Finding of Fact No. 5.)

Between the partition decision and the present time, Florence Gillmor has conveyed her Sawmill Canyon property to Stephen Gillmor and/or Shirley Gillmor, his wife. Stephen Gillmor passed away in February of 1988 and, consequently, the Sawmill Canyon property once owned by Florence Gillmor is now owned by Shirley Gillmor or the Estate of Stephen T. Gillmor, of which Shirley Gillmor is the personal representative. (Finding of Fact No. 8.)

The Sawmill property is in the Wasatch Mountain range and has traditionally been used for grazing livestock. The Gillmor family used the Sawmill Canyon Road historically to obtain access to their property for themselves, their employees and their guests. They used the road to transport and to attend to livestock, to perform maintenance or construct improvements on the property and to hunt on the property by themselves and with their employees and guests. Prior to 1982, the family did not sell permits to persons to allow them to hunt on the Sawmill

property, and did not use the Sawmill road for access for such persons. (Finding of Fact No. 10.)

The Sawmill Canyon Road has historically carried a variety of vehicles, including trucks, sheep camps, heavy equipment and recreational vehicles, and has been travelled by persons in vehicles, on foot and on horseback. (Id.)

In 1982, Stephen Gillmor, as the lessee of the property of Florence Gillmor and Frank Gillmor, began to sell permits to individuals to hunt on the Florence and Frank Gillmor property in Sawmill Canyon. (Tr. 9/25/87, p. 32;[1] Finding of Fact No. 11.) At the same time, defendant Dennis Wright first informed Stephen Gillmor and his permitted hunters that they could not cross the Wright property on the Sawmill road to obtain access to the Gillmor Sawmill property for hunting. (Id.; Finding of Fact No. 12.)

In the fall of 1986, Stephen Gillmor filed this action against the Wright defendants to enjoin their interference with his use of the Sawmill road as access for hunters. Shortly thereafter, a hearing was held on plaintiff's application for a

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1 References to transcripts will be as follows: the hearing on plaintiff's motion for temporary restraining order will be "Tr. 9/30/86"; the hearing on plaintiff's motion for preliminary injunction will be "Tr. 9/25/87"; the hearing on plaintiff's motion to amend judgment will be "Tr. 9/30/87"; and the trial will be "Tr. 9/20/88".

temporary restraining order brought on the theory that plaintiff enjoyed a prescriptive easement or an irrevocable license to cross the Wright property. The court, with Judge Billings presiding, denied plaintiff's application and ruled that plaintiff had an adequate remedy in damages. (See Tr., Judge's Ruling, TRO Hearing, 9/30/86, pp. 3-4.)

After the TRO hearing, Stephen Gillmor discovered in the Summit County Recorder's office a decision rendered by the Third District Court in 1943 entitled Annie Olsen v. Gus Papadopulos. Olsen was the predecessor-in-interest of the Wright defendants. Papadopulos was the lessee of a portion of the Gillmor Sawmill property. In response to Olsen's claim that Papadopulos had no right to use the portion of the Sawmill Canyon Road that crossed Olsen's property, the court ruled that the Sawmill Canyon Road was a public road and enjoined Olsen from interfering with the use of the road by Papadopulos or the public. (See Exhibit 6P, 7P.)

Stephen Gillmor showed Dennis Wright the Annie Olsen decision, and Wright temporarily ceased his resistance to use of the road by Gillmor hunters in 1986. Instead, Wright immediately approached the Summit County Commission and convinced the Commission to abandon the Sawmill Canyon Road as a public road in December, 1986. (Findings of Fact No. 13, 14.)

In the fall of 1987, Stephen Gillmor moved for a preliminary injunction to halt interference with his use of the road. A one-day evidentiary hearing was held before Judge Homer Wilkinson on September 25, 1987. At the conclusion of the hearing, Judge Wilkinson ruled that plaintiff had a right to use the Sawmill Canyon Road for any purpose for which it was lawfully used prior to its abandonment by Summit County in December, 1986. (Tr. 9/25/87, p. 252.) The judge ruled that such legal use did not include hunting by permittees because that practice violated the Summit County zoning ordinance. (Tr. 9/25/87, p. 253.) The court's decision was based upon (Tr. 9/30/87, p. 53) the testimony of Jerry Smith, Director of the Summit County Planning and Building Department (Tr. 9/25/87, p. 190, et seq.), who testified about the zoning implications of a cabin Stephen Gillmor had built on his property in 1987, (Id. at p. 196) after the County's abandonment of the road. (Tr. 9/25/87, p. 45.)

The matter was tried to the court, Judge Michael Murphy presiding, on September 20 and 21, 1988. Judge Murphy issued a written opinion entitled "Summary Decision" in which he indicated that he agreed with plaintiff's position, but that he felt constrained to abide by the opinion of Judge Wilkinson in deference to the law of the case doctrine. (Summary Decision, pp. 7-8.) Judge Murphy did find, however, that plaintiff had suffered

damages of $10,943.00 as a direct result of defendant Dennis Wright's interference with plaintiff's use of the Sawmill Canyon Road for access by hunters. (Finding of Fact No. 20; Exhibit 42P; Tr. 9/20/88, pp. 9-10.)

SUMMARY OF ARGUMENTS

Plaintiff, as an abutting landowner to a public road, is entitled to a right-of-way across the road even after it is abandoned by the public authority. The use of the property reached by the road is not material to what use may be made of the road itself. The road was historically used to carry trucks, recreational vehicles and livestock prior to abandonment. The use of the road contemplated by Shirley Gillmor is the same. She is entitled to a right-of-way to provide access by motor vehicle, recreational vehicle and horseback for any purpose whatsoever, including access for herself and her invitees for hunting and related activities.

ARGUMENT

I. PLAINTIFF IS ENTITLED TO A JUDICIAL DECLARATION THAT SHE IS THE OWNER OF A PRIVATE EASEMENT ACROSS THE SAWMILL CANYON ROAD AS A MEANS OF ACCESS TO THE GILLMOR SAWMILL PROPERTY.

A. A Landowner Whose Property Abuts a Public Road Possesses, by Operation of Law, a Private Easement of Access to and From Her Property Across the Road, Which Survives Any Abandonment of the Public Right-of-Way.

The trial court found, and defendants do not dispute, that plaintiff is a property owner whose property adjoined the Sawmill Canyon Road when it was a public road, and who now continues to own the property since the road was abandoned. (Findings of Fact No. 1, 5, 9, 14.)

Under Utah law, as well as under the law of other jurisdictions, a landowner whose property abuts a public road, possesses, by operation of law, a private easement of access to his property across the public road. See, e.g., Mason v. State, 656 P.2d 465, 468 (Utah 1982); Bailey Service & Supply Corp. v. State, Road Commission, 533 P.2d 882, 883 (Utah 1975); accord Lower Payette Ditch Co. v. Smith, 254 P.2d 417, 420 (Idaho 1953). A subsequent abandonment of the public right-of-way over such a road has no effect on the private easement owned by an abutting landowner. See Mason, supra, 656 P.2d at 468-69; Haque v. Juab

County Mill & Elevator Co., 107 P. 249, 252 (Utah 1910); see also Utah Code Ann. § 27-12-102.5 (1953 Repl. Vol. 1984 Ed.).

The Mason case appears to be the Utah Supreme Court's most recent pronouncement on the subject of an abutting landowner's right of access over an abandoned public road. In Mason, the plaintiff had conveyed to the State in 1951 by warranty deed a strip of land which ran through a larger parcel owned by plaintiff. Thereafter, a highway was constructed across the strip owned by the State. In 1976, after a new freeway was constructed nearby, the State abandoned the old highway, and informed the plaintiff that if he did not buy the strip of land for $3,675, it would be sold to a third person. The plaintiff paid the sum to the State under protest. At approximately the same time, the State tore up and destroyed portions of the abandoned highway.

Plaintiff subsequently commenced an action against the State seeking, inter alia, a judgment requiring the State to restore the portions of the abandoned highway that had been impaired, torn up, or blocked, on the basis of the plaintiff's right of access as an abutting landowner. On appeal from the trial court's dismissal of the plaintiff's claims, the Utah Supreme Court reversed, stating as follows:

> Except where changed by statutes pertaining to limited access highways, . . . an abutting landowner has a private easement of

> ingress and egress to existing public highways.
>
> This private easement of access has been held to survive the abandonment or vacation of the public highway.

656 P.2d at 468 (citations omitted). Similarly, in the present case, plaintiff, as the owner of property abutting the Sawmill Canyon Road, has a private easement of access over the road, which survives Summit County's abandonment of the pubic right-of-way over the road.

B. Plaintiff's Easement of Access Permits Access by Hunters.

Judge Wilkinson ruled on plaintiff's motion for a preliminary injunction that any lawful use of the Sawmill Canyon Road up to the time of its abandonment in December, 1986 was an appropriate use. Judge Wilkinson then went on to rule that plaintiff's use of the property for hunting was not a lawful activity because it violated the Summit County zoning ordinance[2] and, therefore, use of the road for that purpose could not be considered for purposes of establishing the permissible use of

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2 Plaintiff disagrees with the lower court's ruling that hunting, as conducted by Stephen Gillmor on the property prior to December, 1986, violated applicable zoning laws. Because use of the road after abandonment is determined by use of the road prior to abandonment, and not use of the property, plaintiff will not include in this brief argument on the interpretation of the zoning ordinance.

the road after abandonment. (Tr. 9/25/87, p. 253.) Judge Wilkinson was in error in his holding, basing it upon a misapplication of the Utah Supreme Court's decisions in Haque v. Juab County Mill & Elevator Co., 107 P. 249 (Utah 1910) and Mason v. State, supra.

Judge Michael Murphy disagreed with Judge Wilkinson. Judge Murphy said, in his Summary Decision (Addendum "B"):

> It is clear that Judge Wilkinson's interpretation and application of Haque v. Juab County Mill & Elevator Co., 107 P. 249 (Utah 1910) and Mason v. State, 656 P.2d 465 (Utah 1982) differs with the views heretofore expressed in this Summary Decision. Judge Wilkinson's views also suggest that the purposes for which access is sought determine whether access is to be allowed. (P.I. tr., p. 253, ln. 13-15, 22-24). This Summary Decision, however, indicates that a destination purpose does not taint one's use of an easement or right-of-way as long as that use is not a different or greater burden on the servient estate. The law of the case doctrine, however, dictates that Judge Wilkinson's interpretations and application prevail.

(Summary Decision at p. 7.)

Judge Wilkinson's decision was in error for several reasons. First, his decision that hunting, as conducted by Stephen Gillmor, constituted an illegal use of the property was based upon testimony surrounding the construction of a cabin by Mr. Gillmor. The line of questioning that concerned the issue was directed to Jerry Smith, the Director of the Summit County

Planning and Building Department, who was asked about a building permit Mr. Gillmor had obtained when he constructed the cabin. (See Tr. 9/25/87, pp. 191-195.) The cabin was not constructed until 1987. The county abandoned the Sawmill Canyon Road in December, 1986. The correct inquiry is to the use of the road prior to its abandonment. Events occurring after the abandonment are immaterial. Judge Wilkinson himself recognized the error in the hearing on plaintiff's motion to amend judgment when he said, "I do think [plaintiff's] argument is well taken when he argues that what happened after December 26th of '86 is irrelevant and the building of the house and the--and so forth on there." (Tr. 9/30/87, p. 55.)

Additionally, Judge Wilkinson's decision was based upon a misunderstanding of the Haque and Mason opinions. Those cases do not stand for the proposition that the use of the abutting property is pertinent to the use of the road after abandonment, and they do not support Judge Wilkinson's conclusion that unlawful activities on the property render use of the road for access unlawful and, therefore, impermissible. In Mason v. State, supra, discussed above, plaintiff owned a piece of property which was bisected by a public highway. The highway was eventually abandoned and torn up, and plaintiff sued to obtain, among other things, a judgment requiring the state to restore the highway.

The Utah Supreme Court remanded to the lower court to take additional evidence, but held that the abutting property owner has an easement over the abandoned highway to the extent it is necessary for ingress and egress to and from the property. No mention whatsoever was made by the court of the reason for which the property owner might be travelling over the abandoned highway, or of the use to which he would put his property when he arrived there.

The Mason opinion cited the decision in Haque v. Juab County Mill & Elevator Co., 107 P. 249 (Utah 1910). In Haque, plaintiff owned property which fronted on a public road. The road was subsequently abandoned. Defendant maintained a ditch between plaintiff's property and the road. Defendant modified its ditch so that plaintiff could no longer cross from the street to his property and plaintiff sued to enjoin operation of the ditch in any way which interfered with his access. The lower court's award of an injunction to plaintiff was upheld. In the process, the court explained that the property owner was entitled to a reasonably convenient passage way from his premises to the road. By the same token, said the court, plaintiff could not prevent defendant from using the ditch for the purposes for which it was constructed and used prior to the commencement of the litigation. The extent of defendant's rights to use the ditch,

however, are not unlimited, said the court. If the banks and sides of the ditch were maintained in the street at a certain width and height during all of the years that the ditch has been used by defendant, it may not, for its own convenience, change the channel, if such change interferes with the rights of others. (Id. at p. 251.)

Neither Haque nor Mason considers in any way the use of the property to determine the use of the road. Finally, neither case restricted the use of the road after abandonment to the same type of use made before abandonment. That concept was discussed only in the Haque case and then only with respect to what activities were permissible by defendant if it appeared they would interfere with plaintiff's right of access over the abandoned road. In short, Haque and Mason establish the law in this state to be that Shirley Gillmor, in this case, may continue to use the Sawmill Canyon Road for any purpose whatsoever to obtain access to her property, including access for hunters.

Even if the use of the road is to be restricted to the same type of use made prior to abandonment, Shirley Gillmor's use is permissible. The Sawmill Canyon Road has historically been used to obtain access to the property by persons travelling on foot, on horseback and by a variety of vehicles, including trucks, sheep camps, heavy equipment and recreational vehicles.

(Finding of Fact No. 10; Tr. 9/25/87, pp. 29-30, 170-172.) During the years 1982 through 1986, those persons who travelled on the Sawmill Canyon Road in order to exercise hunting rights on the Stephen Gillmor property travelled there primarily by trucks and recreational vehicles. (Finding of Fact No. 11; Tr. 9/25/87, p. 44.) The trial court specifically found that while there was minimal evidence of road damage by hunters, there is realistically no difference in the nature of the use of the road itself, whether the ultimate use of the various parcels is for commercial hunting, grazing or both. (Finding of Fact No. 18.) Additionally, the court found that, while there was also some minimal evidence that hunters are bothersome at times to ranchers, cattle and sheep, there was no sufficient showing that hunters' use of the road interfered with the abutting owners' use of, or access to, their land. (Finding of Fact No. 19.)

Assuming the use of the road is not altered in a significant way, there is a good reason why a change in the use of the property should not preclude use of the road. If the rule were so, the use of the property could never be altered to achieve its highest and best use over time. With respect to the Shirley Gillmor property, for example, Stephen Gillmor had determined that it is possible to supplement his ranching income with income from the sale of hunting permits through an activity

that is entirely consistent with agricultural operations and which allowed him to make more complete use of the land. The law should encourage landowners to realize the potential of their land, and not to restrict its use unnecessarily.

II. PLAINTIFF IS ENTITLED TO A PERMANENT INJUNCTION AND DAMAGES.

Beginning in 1982, the Wright defendants prevented the plaintiff's use of the road for access by hunters. Those defendants have indicated they intend to continue to prevent plaintiff from using the road for access by hunters. (Tr. 9/25/87, pp. 174-175.) Under the circumstances, plaintiff is entitled to a permanent injunction enjoining any interference by the Wright defendants with plaintiff's use of the road for access by hunters.

Plaintiff is also entitled to damages for past interference. The evidence was uncontroverted that plaintiff suffered $10,940.00 in damages in the form of revenues that were lost from hunters who had made reservations to hunt on the property, and in fees that had to be paid to an adjoining landowner to temporarily obtain alternative access to the property. (Finding of Fact No. 20; Exhibit 42; Tr. 9/20/88, pp. 9-10.) Plaintiff is entitled to a judgment for that sum against the Wright defendants.

CONCLUSION

Shirley Gillmor requests that this Court reverse the judgment of the lower court and instruct that the lower court enter judgment in favor of plaintiff declaring that plaintiff enjoys a private easement of access on the Sawmill Canyon Road for herself, permittees, invitees and licensees for all purposes, including access for hunting; that the court issue a permanent injunction enjoining defendants' interference with plaintiff's use of the Sawmill Canyon Road; and that the lower court enter judgment in favor of plaintiff against the Wright defendants for money damages in the sum of $10,940.00.

DATED this 15th day of November, 1989.

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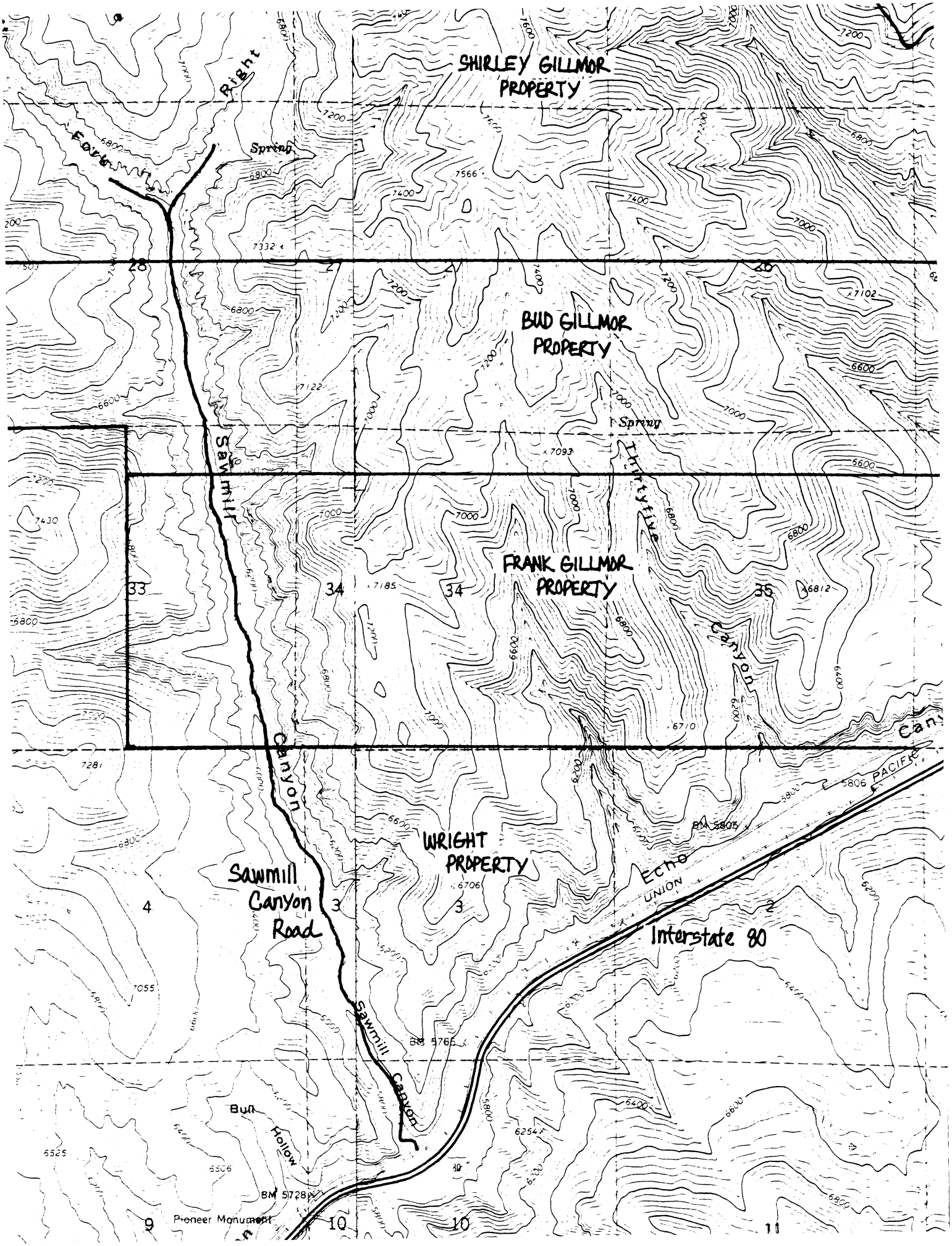
Shirley Gillmor

ADDENDUM

Tab A


SHIRLEY GILLMOR PROPERTY
BUD GILLMOR PROPERTY
FRANK GILLMOR PROPERTY
WRIGHT PROPERTY
Right
Spring
Sawmill
Thirtyfive
Canyon
Sawmill Canyon Road
Sawmill Canyon
Bull Hollow
Echo
UNION
PACIFIC
Interstate 80
BM 5805
BM 5766
BM 5728
Pioneer Monument
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Tab B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

FLORENCE J. GILLMOR and SHIRLEY GILLMOR, as the personal representative of the Estate of STEPHEN T. GILLMOR,	:	SUMMARY DECISION
	:	CIVIL NO. 9067
Plaintiffs,	:	
vs.	:	
DENNIS K. WRIGHT, SARA C. WRIGHT, DAVID L. WRIGHT, RONA R. WRIGHT and SUMMIT COUNTY, a body politic,	:	
Defendants,	:	
vs.	:	
CHARLES F. GILLMOR and EDWARD LESLIE GILLMOR,	:	
Intervenor-Defendants.	:	

Following trial, the court took this matter under advisement and is now prepared to issue its decision. This Summary Decision is not a substitute for Findings of Fact and Conclusions of Law but is intended to provide the parties with an explication of the reasons for the court's decision. As a consequence, no attempt will even be made to recite the history of this and other related

litigation.[1] That history, recounting these parties' odyssey from court to court and judge to judge, could compete with the best known works of Homer in intricacy, length and author's time.

Without even considering the other cases in which most of these parties have participated, this case alone has consumed substantial court resources. The two day trial on September 20 and 21, 1988 was the third annual evidentiary hearing in this particular litigation. Following trial, the court was required to review the transcripts and understand the two previous evidentiary hearings. Furthermore, the court was obligated to fully consider and understand the partition litigation which was tried before Judge Leary in 1977 and again in 1980. To the uninitiated, such as this court per Judge Murphy, these tasks were not insubstantial. As a consequence, these parties cannot expect a speedy decision and do not have any right to claim priority over those members of the public whose causes were submitted following the trial of this case.[2] Moreover, these parties should be expected to live with and abide by the

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[1]These and related disputes have been to the Supreme Court twice, the Court of Appeals once and before district Judges Hall, Leary, Frederick, Billings, Wilkinson and now Murphy. A further voyage on appeal of a judgment based on this decision is likely.

[2]The court was not pressed to resolve this case so that the seasonal rights asserted could immediately be exercised. The deer and elk hunting season was virtually upon the parties when the matter was tried. Thus, the earliest time for exercise of disputed rights is Spring, 1989 when grazing might occur.

decisions and orders of the various courts and judges whose time they have liberally consumed and whose jurisdiction they have freely invoked.

The issues presented for final resolution before this court at this time are twofold:

1. Is the plaintiff entitled to use the Sawmill Canyon Road in furtherance of a commercial hunting operation on abutting land?

2. Are the intervenor-defendants entitled to use the Sawmill Canyon Road over plaintiff's land for livestock access to the eastern portion of their own land?

I. PLAINTIFFS' USE OF ROAD

Plaintiff seeks to use Sawmill Canyon Road for access to run a commercial hunting enterprise on its property. Defendants and intervenor-defendants oppose such use on the grounds that it is limited to ranching access, would expand the historical use of the road and interfere with the historical use of the abutting owners' land.

The record is clear that there was no actual or attempted commercial hunting on the parcels in question prior to 1982. While there was some minimal evidence of road damage by hunters, there is realistically no difference in the nature of the use of

the road itself whether the ultimate use of the various parcels is for commercial hunting, grazing or both. There was also some minimal evidence that hunters are bothersome at times to ranchers, cattle and sheep but there was no sufficient showing that hunters' use of the road interfered with the abutting owners' use of or access to their land.

Essentially, defendants' position seeks to limit both plaintiff's use of abutting land and the access road. Hague v. Juab County Mill & Elevator Co., 107 P. 249 (Utah 1910) is inapposite and is not authority to limit plaintiff's use of the road based on what use it intends to put the abutting land. In Hague the new use placed a greater burden on the street. In the instant case there is no real difference in the use of the road by hunters or ranchers; only their objectives, once access is accomplished, are different. In the Hague case the increased burden on the street interfered with the abutting owner's access to his own land. In the instant case, there is insufficient evidence that hunters' use of the road interferes with defendants' use of the road. Finally, in Hague there was no objection to what Juab Mill and Electric did on their fee land. In this case, however, defendants essentially seek to limit the plaintiff's use of its abutting land once access is accomplished.

Mason v. State, 656 P.2d 465 (Utah 1982), is equally inapposite. In Mason the Court was concerned with defendant's interference with reasonable access to plaintiff's abutting land. There is insufficient evidence before this court, however, to establish that hunters' use of the road will interfere with defendants' access to their abutting land.

The applicability of the above factual determinations and interpretations of law to the final decision in this case are affected by earlier proceedings. All proceedings in this litigation before this court are an integrated whole. The law of the case doctrine limits a successor judge and renders many of the rulings of predecessor judges binding upon the parties as long as this court retains jurisdiction. The expressed underpinning of the doctrine is delay avoidance. The unexpressed underpinnings are public confidence in the integrity of court decisions, the proposition that different personifications of the same court do not affect its interpretations, and the fundamental precept that ours is a government of laws, not men. The law of the case doctrine has particular applicability to district court proceedings in Summit County where individual calendaring is not utilized and judges are rotated semiannually. Consequently, it is necessary to analyze the decisions of predecessor judges in this case.

The law of the case doctrine has little applicability to the denial of plaintiff's Motion for a Temporary Restraining Order. The TRO proceedings did not involve an interpretation of substantive law. Plaintiff's motion was denied in September, 1986 by Judge Judith Billings for want of irreparable injury. Plaintiff now seeks damages and a permanent injunction which would interdict accrual of further damages.

In the TRO proceedings it was assumed that the extent of all parties right to use the Sawmill Canyon Road was dictated by their respective unchallenged prior use. Following denial of plaintiff's Motion for Temporary Restraining Order, however, it was determined and stipulated that the Sawmill Canyon Road had been adjudicated to be a public road. Consequently, the Wright defendants temporarily ceased interfering with plaintiff's use of the road and undertook to have Summit County abandon the road as a public way. This the County did in December, 1986 and defendants resumed their interference with plaintiff's use of Sawmill Canyon Road for hunting access.

The September, 1987 proceedings before Judge Homer Wilkinson on plaintiff's Motion for Preliminary Junction, while again considering relief pendente lite, did involve interpretations of substantive law. Consequently, this court must now determine exactly what was decided and the applicability of the law of the case doctrine to such decision. Because there appears to have

been no entry of formal, written Findings of Fact and Conclusions of Law, resort must be made to the transcripts of the hearing on plaintiff's Motion for Preliminary Injunction and the hearing on plaintiff's motion to reconsider findings and conclusions.[3]

Following a one day trial on plaintiffs' Motion for Preliminary Injunction, Judge Wilkinson ruled that any lawful use of Sawmill Canyon Road up to the time of its abandonment in December, 1986 was an appropriate use. Judge Wilkinson further ruled that plaintiff's proposed use for hunting access following the abandonment was an expansion of prior use and was not a lawful use. (P.I. tr. p.252, ln. 16 to p. 253, ln. 18; p. 254 ln. 1-7; p. 255, ln. 14-21).

It is clear that Judge Wilkinson's interpretation and application of Hague v. Juab County Mill & Elevator Co., 107 P. 249 (Utah 1910) and Mason v. State, 656 P 2d 465 (Utah 1982) differs with the views heretofore expressed in this Summary Decision. Judge Wilkinson's views also suggest that the purposes for which access is sought determine whether access is to be allowed. (P.I. tr., p. 253, ln. 13-15, 22-24). This Summary Decision, however, indicates that a destination purpose does not taint one's use of an easement or right of way as long as that use is not a different or greater burden on the servient estate.

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[3]These transcripts will be referenced as "P.I. tr. p.____, ln. _____" and "Rule 59 tr., p._____, ln._____," respectively.

The law of the case doctrine, however, dictates that Judge Wilkinson's interpretations and application prevail.[4]

Immediately following Judge Wilkinson's ruling, plaintiff filed a motion seeking reconsideration of his ruling in light of newly proffered evidence. That new evidence was composed of two letters from the Summit County Attorney, one to the director of the Planning Commission, a witness before Judge Wilkinson, and the other to Stephen Gillmor, whose estate is now the plaintiff. Judge Wilkinson did not receive the new evidence and refused to consider the zoning ordinance. (Rule 59 tr., pp. 52-56). The court ruled that, considering only activities prior to 1986 (sic), plaintiff's use of its property violated zoning ordinances. (Rule 59 tr., p. 60, ln. 6-20).

At the 1988 hearing the previously rejected letters of the Summit County Attorney, Exhibits 40 and 41, were received. Additionally, the court received Exhibit 39, a March 8, 1988 letter from the Summit County Planning Commission to plaintiff's counsel determining that a commercial hunting operation was a permitted use on property zoned AG-1, which was the categorization of plaintiff's abutting land. Finally, the court received the Development Code of Summit County, Exhibit 38. The

[4]While Judge Wilkinson's ruling is in part couched in the preliminary injunction lexicon of probability of success, he did make the referenced rulings of law to which the law of the case doctrine applies.

above-referenced pieces of evidence constitute the only significant new liability evidence in plaintiff's case-in-chief which had not previously been considered by Judges Billings and Wilkinson. This court, then, must consider whether such evidence would change the outcome by establishing that commercial hunting was a lawful use prior to 1987.[5]

The letters from the Summit County Attorney, Exhibits 40 and 41, are not particularly helpful. The Development Code, Exhibit 38, is the most helpful in determining what was allowed under what conditions in an AG-1 area, such as those abutting the Sawmill Canyon Road. Section 12.20 describes authorized uses in all zones and provides that a particular use is not allowed in two situations: (1) the use is not specified in the accompanying listing; or (2) is specified but indicated by the signal "___." In the accompanying list, there is no specific reference to hunting and use Nos. (4), (5)B., (5)C., an (7)D., are the only categories which could be inclusive of commercial hunting. Two of these categories are conditional uses and two are forbidden uses. There is no evidence that at any time in or before 1986 a permit for conditional use was issued to plaintiffs. Therefore, it would appear that commercial hunting was not a lawful use prior to 1987.

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[5]While Judge Wilkinson premised his ruling on pre-1986 use (Rule 59 tr., p. 60, ln. 6-20), it is clear that he merely intended to exclude consideration of plaintiff's 1987 conduct of constructing a cabin.

Exhibit 39 constitutes a March 8, 1988 recitation of an interpretation of the Development Code which is contrary to this court's interpretation. Exhibit 39 opines that commercial hunting in the form of sale of permits in an AG-1 is a permitted use. Section 12.21(4) of the Development Code, however, suggests by its use of the word "hereafter" that determinations such as Exhibit 39 are prospective only. Such a determination in 1988 would therefore not render lawful an otherwise unlawful pre-1988 use.[6] There is, then, no new evidence before the court to support plaintiff's claim for relief. The court, however, readily concedes that little focus was had on the interpretation of the Development Code and the determination of the Summit County Planning Commission in Exhibit 39. Consequently, without encouraging the same, the court would entertain argument on reconsideration of this portion of the Summary Decision.

II. INTERVENORS' GRAZING ACCESS

The Judgment and Decree of Partition purports to be a full and complete resolution of the relative property rights of the plaintiffs and intervenors. In affirming the judgment, the Utah Supreme Court delineated factors that remain pertinent to this

[6]Plaintiff has also asserted a damage claim for interference with access. Even if the Exhibit 39 determination was retrospective, the court is not certain that damages in addition to injunctive relief would be appropriate.

renewed dispute. The Court acknowledged that historical uses are not sacrosanct in partition cases and that Edward Gillmor's ranching activities would in fact be affected and curtailed. Gillmor v. Gillmor, 657 P.2d 736, 740-41 (Utah 1982). The Court further indicated it was appropriate that "preservation of suitable grazing lands" not be the primary consideration of the partitioning court. Id., at 741. Finally, the Court expressly accepted the consequence that "the land as partitioned may be less usable for grazing" and suggested that grazing be effected by leases among the parties. Id. It is in the context of these remarks and the Court's ultimate affirmance of the judgment that this court must consider the intervenors' efforts under Rule 60(b), Utah Rules of Civil Procedure, to be relieved from the judgment.

Specifically, intervenors seek access over the parcels awarded to plaintiff in order to graze stock on the eastern portion of parcels awarded them. In order to allow such access this court would have to relieve the intervenors of the final judgment in the partition action and amend the partition decree.

In addition to being presented with testimonial evidence, the court inspected the premises, traversed in a four-wheel drive vehicle the length of Sawmill Canyon Road, viewed each end of 35 Canyon and walked the length of Pine Canyon. This evidence persuaded the court that intervenors do not have traditional

grazing access to the eastern portions of their own parcels unless they are allowed access over the parcels awarded plaintiff.

35 Canyon is not accessible for grazing from the south. Consequently, access over intervenors' own land to eastern portions must be through Pine Canyon. Stock in limited numbers and in single file can be moved from the Sawmill Canyon Road through Pine Canyon to the eastern grazing area. Moving the stock back down Pine Canyon is even more limited, difficult and treacherous. Herding stock through Pine Canyon, then, does not constitute traditional grazing access. This is consistent with the testimony of Richard Huffman in the second partition trial. Mr. Huffman did not even consider Pine Canyon for access. Additionally, earth moving equipment cannot create a stock trail through Pine Canyon for traditional grazing access. The evidence did establish, however, that as many as 150 head of cattle can be moved the length of the Sawmill Canyon Road over plaintiff's parcels to the eastern portions of intervenors' parcels in less than a full day.

Intervenors have presented argument suggesting inconsistencies in the evidence and underlying Findings of Fact and Conclusions of Law and the Judgment and Decree of Partition. This court has considered each of these arguments but views the alleged inconsistences as mere incongruities. Suffice it to say

that the record as a whole does not indicate an intent by the court in the partition action to provide intervenors access over plaintiff's awarded parcels. Furthermore, the transcript indicates that the difficulty of access to the eastern portions of the parcels was addressed in testimony before Judge Leary in the partition trial.

This case presents a situation where the alleged mistake, if any, could have and should have been corrected in the partition trial. Intervenors point to Exhibit 113-D[7] in the partition action as the genesis of the mistake. This document, however, was actually offered and sponsored by intervenor Charles Gillmor. Furthermore, intervenor Edward Gillmor failed to review Exhibit 133-D and move to strike as he was expressly cautioned to do. All parties had the opportunity to and did in fact elaborately review the Findings of Fact and Conclusions of Law and Judgment and Decree of Partition.

Under such circumstances, it would be inappropriate and unwise to invoke the catchall provision of Rule 60(b)(7) to grant relief from the final judgment. This is a case where the finality of the judgment should not be undermined over eight years after its entry and six years after its affirmance in response to assertions which suggest at the most "mistake,

[7]Exhibit 46-D in this action.

inadvertence, surprise, or excusable neglect." See, Rule 60(b)(7), Utah Rules of Civil Procedure. This particular case indicates the danger of undermining final judgments. Courts should not provide inspiration to these parties to continue litigating the partition case ad infinitum. Instead, these parties should accept the decisions rendered, heed the admonition of the Utah Supreme Court and effectuate traditional grazing access "by leasing from one another." 657 P.2d at 741.

Intervenors suggest that the Judgment and Decree of Partition is no impediment to an order of this court granting an easement by implication or necessity. Such an order, however, would violate traditional notions of finality inherent in the doctrines of res judicata and collateral estoppel.

III. CONCLUSION

Given these parties' proclivity to invoke the jurisdiction of courts, it is not surprising that, as their continuing disputes age in the courts, the doctrines of the law of the case, finality of judgments and res judicata come into play. This case and these disputes illustrate the fundamental wisdom inherent in such doctrines. The application of these doctrines in this case leaves these parties as they were found and requires them to live with the decisions of the courts whose jurisdiction they have so freely invoked. If the parties must resort to the courts to

resolve their disputes, then they must adhere to and respect the integrity of the decisions of those courts.

For the foregoing reasons, the court determines that plaintiff's Complaint and intervenors' Counterclaims should be dismissed, each party to bear its own costs. Plaintiff should prepare a draft of Findings of Fact and Conclusions of Law and submit the same to defendants and intervenors for inclusion of matters pertinent to the issues upon which they prevailed. The court fully realizes that certain of its factual resolutions in this Summary Decision might provide fodder for appeal. These factual resolutions, however, do not dictate the result in this court. In the event a reviewing court chooses to reverse this court's judgment, those factual resolutions will avert the necessity of a new trial. The court expects to be presented with Findings of Fact and Conclusions of Law approved as to form by all parties.

For judicial economy and other obvious reasons, the court intends to forward this Summary Decision to the presiding judge and suggest that he permanently reassign this case and any further proceedings in the partition action to Judge Murphy pursuant to this court's inherent power.

Dated this 28th day of November, 1988.

/S/

MICHAEL R. MURPHY
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Summary Decision, postage prepaid, to the following, this 29th day of November, 1988:

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Tab C

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IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

* * * * * * * *

SHIRLEY GILLMOR, as personal representative of the estate of Stephen T. Gillmor, Plaintiff, vs. DENNIS K. WRIGHT, SARA C. WRIGHT, DAVID L. WRIGHT, RONA R. WRIGHT, Defendants, and CHARLES F. GILLMOR, EDWARD LESLIE GILLMOR, Intervenor-Defendants.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. 9067 Judge Michael R. Murphy

* * * * * * * *

This matter came on for trial to the Court, Honorable Michael R. Murphy presiding, on September 20 and 21, 1988. This matter had earlier come on for evidentiary hearings before Honorable Judith M. Billings on plaintiff's motion for temporary restraining order, September 30, 1986, and before Honorable Homer

Wilkinson on plaintiff's motion for preliminary injunction, September 25, 1987. Plaintiff Shirley Gillmor was present at trial and represented by James B. Lee and John B. Wilson of Parsons, Behle & Latimer. Defendant Dennis K. Wright was present and represented by D. Gilbert Athay of Athay & Associates. Intervenor-defendant Edward Leslie Gillmor was present and represented by R. Stephen Marshall of VanCott, Bagley, Cornwall & McCarthy. Intervenor-defendant Charles F. Gillmor was present and represented by D. Gilbert Athay of Athay & Associates. The Court observed and heard the testimony of the witnesses, reviewed the exhibits submitted by the parties, and reviewed the trial memoranda submitted by the parties. The Court reviewed portions designated by the parties of the transcripts of the hearings on plaintiff's motion for temporary restraining order, plaintiff's motion for preliminary injunction and plaintiff's motion to amend the judgment on her motion for preliminary injunction. The Court reviewed selected transcripts designated by the parties from the trial of the "partition case", Edward Leslie Gillmor, et al., v. Florence Gillmor, et al., Salt Lake County Third District Civil No. 223998, as well as selected exhibits from the partition case and the opinion of the Utah Supreme Court on the appeal of the same case, reported at 657 P.2d 736 (Utah 1982). The Court travelled in a vehicle the length of the Sawmill Canyon road from the I-80 frontage road to the property of Shirley Gillmor. The

Court continued in a vehicle to the southeast portion of the Sawmill property owned by Shirley Gillmor. The Court walked the length of Pine Canyon. The Court viewed each end of 35 Canyon.

The Court, being fully advised in the premises, and good cause appearing therefor, now hereby makes and enters the following:

FINDINGS OF FACT

1. Plaintiff Shirley Gillmor is the owner of certain real property located in Summit County, Utah and more particularly described as follows:

> The south 112.0 acres of Section 21, the south 112.0 acres of Section 22, the south 111.0 acres of that portion of Section 23 owned by Gillmors, the north 316.46 acres of Section 26, the north 316.46 acres of Section 27, the north 316.54 acres of Section 28 less the northeast quarter of the northeast quarter, total net 276.46 acres, and the southeast quarter of the northeast quarter of Sections 30, T4N, R5E, SLB&M. Contains 1284.58 acres.
>
> * * *
>
> The north 528 acres of Section 21, the north 528 acres of Section 22, the north 229 acres of that portion of Section 23 owned by Gillmors, T4N, R5W, SLB&M. Contains 1285 acres.

The property owned by Shirley Gillmor as described herein is the northern one-half of a larger parcel of property commonly known as the "Gillmor Sawmill Property".

2. Intervenor-defendant Edward Leslie Gillmor is the owner of a portion of the Gillmor Sawmill Property located in Summit County, Utah and more particularly described as follows:

> The south 323.54 acres of Section 26, the south 323.54 acres of Section 27, the south 323.54 acres of Section 28, the north 63 acres of the east half of Section 33, the north 125.49 acres of Section 34 and the north 125.51 acres of Section 35, T4N, R5E, SLB&M. Contains 1284.62 acres.

3. Intervenor-defendant Charles F. Gillmor is the owner of a portion of the Gillmor Sawmill Property located in Summit County, Utah and more particularly described as follows:

> The south 257 acres of the east half of Section 33 and the south 513.75 acres of Section 34 and the south 514.50 acres of Section 35, less .73 acre reserved to State Road Commission of T4N, R5E, SLB&M. Contains 1284.50 acres.

4. Defendants Dennis K. Wright, Sara C. Wright, David L. Wright and Rona R. Wright are owners of certain real property located in Sections 3 and 10, R5E, T3N, SLB&M, Summit County, Utah.

5. The Sawmill Canyon Road, as described by the Third Judicial District Court of Summit County in the matter of Olsen v. Papadopulos, begins at the frontage road to Interstate 80 in Echo Canyon in Section 10, Range 5 East, Township 3 North, SLB&M, and proceeds in a generally northerly direction crossing consecutively the property of the Wright defendants, Charles F. Gillmor, Edward Leslie Gillmor and terminating on the property owned by

Shirley Gillmor at a point commonly known as "the forks" located in Section 28, R5E, T4N, SLB&M. There is access by four-wheel drive vehicle from the forks to the eastern portions of the Gillmor Sawmill Property by dirt roads.

6. The Sawmill Canyon Road is a single lane dirt road located in the bottom of Sawmill Canyon.

7. The Gillmor Sawmill Property was at one time owned in common by Florence Gillmor, Edward Leslie Gillmor and Charles Frank Gillmor. It was partitioned by an order of the Third Judicial District Court dated February 14, 1981 in Civil No. 223998. The partition decision was affirmed on appeal by the Utah Supreme Court in its opinion, Gillmor v. Gillmor, 657 P.2d 736 (Utah 1982).

8. The property awarded to Florence Gillmor was subsequently conveyed over time to Stephen T. Gillmor and/or his wife, Shirley Gillmor. Stephen T. Gillmor passed away in February, 1988 and, as of the trial of this action, the portion of the Sawmill Property awarded to Florence Gillmor was owned by Shirley Gillmor and Shirley Gillmor has been substituted for Stephen Gillmor as the plaintiff.

9. Between September, 1943 and December, 1986, the Sawmill Canyon Road was a public road, having been declared to be such in 1943 by the decision of the Third Judicial District Court of Summit County in the matter of Olsen v. Papadopulos.

10. The Gillmor family, for many years prior to December, 1986, used the Sawmill Canyon Road to obtain access to their property for themselves, their employees and their guests to transport and tend livestock, to perform maintenance or construct improvements on the property, and for big game hunting by the family, employees and guests, but not including access for persons holding permits from the landowners to hunt big game. The road has historically carried a variety of vehicles including trucks, sheep camps, heavy equipment and recreational vehicles, and has been travelled by persons on foot and on horseback.

11. During the years 1982 through 1986, Stephen Gillmor sold permits to allow persons to hunt big game on the Gillmor Sawmill Property awarded to Florence Gillmor, and some of those persons to whom permits were sold travelled in trucks to the Florence Gillmor Sawmill Property on the Sawmill Canyon Road and hunted big game there.

12. At various times during the years 1982 through 1986, Stephen Gillmor was unable to transport hunters over the Sawmill Canyon Road because he was stopped from doing so by defendant Dennis Wright, who maintained that Stephen Gillmor did not have the right to transport paying hunters across the Wright property using the Sawmill Canyon Road.

13. In 1986, Stephen Gillmor discovered the decision in Olsen v. Papadopulos and presented it to Dennis Wright, who

thereupon temporarily ceased his interference with Stephen Gillmor's use of the road.

14. On December 24, 1986, at the request of the Wright defendants, the Summit County Commission formally abandoned the Sawmill Canyon Road as a public road whereupon defendant Dennis Wright reiterated the position of the Wright defendants that Stephen Gillmor could no longer use the Sawmill Canyon Road to transport paying hunters across the Wright property.

15. From 1982 through 1986, Stephen Gillmor used the Sawmill Canyon Road for access for his paying big game hunters, and would have used the road for such purpose on more occasions, but for the interference by Dennis Wright.

16. The Gillmor Sawmill property has been designated by Summit County as Agriculture-Grazing (AG-1) Zone.

17. The sale of big game permits by Stephen Gillmor and hunting pursuant to such permits, without a conditional use permit having been issued, was not a lawful use of the Sawmill Property during the years 1982 through 1986 because such activities violated the AG-1 zoning ordinance.

18. While there was some minimal evidence of road damage by hunters, there is realistically no difference in the nature of the use of the road itself, whether the ultimate use of the various parcels is for commercial hunting, grazing or both.

19. There was also some minimal evidence that hunters are bothersome at times to ranchers, cattle and sheep, but there was no sufficient showing that hunters' use of the road interfered with the abutting owners' use of or access to their land.

20. Plaintiff suffered damages of $10,943 dollars in revenues lost as a direct result of defendant Dennis Wright's interference with Stephen Gillmor's use of the Sawmill Canyon Road for access by hunters.

21. Plaintiff and his agents, servants and hunters did not trespass upon property belonging to Charles Gillmor or Edward L. Gillmor.

22. Plaintiff Stephen T. Gillmor and his agents and hunters did not create a nuisance.

23. Plaintiff was not unjustly enriched by the conduct of hunting operations.

24. In its opinion on the appeal of the partition case, the Utah Supreme Court ruled that historical uses of property are not sacrosanct and that Edward Gillmor's ranching activities would be affected and curtailed and that it was appropriate that preservation of suitable grazing lands not be the primary consideration of the partitioning court and that the land as partitioned may be less useable for grazing.

25. Edward Gillmor and Charles Gillmor do not have traditional grazing access to eastern portions of their Sawmill

parcels unless they are allowed access over parcels awarded to Florence Gillmor and now owned by Shirley Gillmor.

26. Thirty-Five Canyon is not accessible for grazing from the south. Consequently, access over intervenors' own land to eastern portions must be through Pine Canyon. Stock in limited numbers and in single file can be moved from the Sawmill Canyon Road through Pine Canyon to the eastern grazing area. Moving the stock back down Pine Canyon is even more limited, difficult and treacherous. Herding stock through Pine Canyon then does not constitute traditional grazing access. This is consistent with the testimony of Richard Huffman in the second partition trial. Mr. Huffman did not even consider Pine Canyon for access.

27. Earthmoving equipment cannot create a stock trail through Pine Canyon for traditional grazing access. The evidence did establish, however, that as many as 150 head of cattle can be moved the length of Sawmill Canyon Road over plaintiff's parcels to the eastern portions of intervenor's parcels in less than a full day.

28. The trial court in the partition action did not intend to provide Edward Gillmor and Charles Gillmor access over parcels awarded to Florence Gillmor.

29. The difficulty of access to the eastern portions of the Charles Gillmor and Edward Gillmor parcels was addressed in testimony in the partition case.

30. The source of the "mistake" in the partition decision alleged by Charles Gillmor and Edward Gillmor is Exhibit 46-D (Exhibit 113D in the partition case). Exhibit 46-D was offered in the partition case by Charles Gillmor. Edward Gillmor failed to review Exhibit 46-D in the partition case and to move to strike it as he was expressly cautioned by the Court to do.

31. Under such circumstances, it would be inappropriate and unwise to invoke the catch-all provision of Rule 60(b)(7) to grant relief from the final judgment. This is a case where the finality of the judgment should not be undermined over eight years after its entry and six years after its affirmance in response to assertions which suggest at the most, "mistake, inadvertence, surprise, or excusable neglect".

32. An order granting an easement by implication or necessity would violate traditional notions of finality inherent in the doctrines of res judicata and collateral estoppel.

Based upon the foregoing findings of fact, the Court now hereby makes and enters the following:

CONCLUSIONS OF LAW

1. The Sawmill Canyon Road was a public road until its abandonment by Summit County on December 24, 1986, following

which the Sawmill Canyon Road was a private road. Plaintiff, as an abutting landowner, retained a right to use the road for any purpose for which it was lawfully used prior to abandonment in December, 1986.

2. Plaintiff is entitled to use the Sawmill Canyon Road for access for herself, her family, agents, servants and guests for purposes related to the conduct of her ranching operation, for improvement or maintenance of the property, for recreation and similar uses consistent with the use of the road prior to December, 1986.

3. Plaintiff is not entitled to use the Sawmill Canyon Road for access by paying hunters because use of the Gillmor Sawmill Property for hunting by persons who had purchased permits, without a conditional use permit having been issued, was in violation of the AG-1 zoning ordinance and would, therefore, not be a lawful use of the property.

4. Defendants are not liable for interfering with the use of the Sawmill Canyon Road by plaintiff for access by paying hunters.

5. Plaintiff is not entitled to an injunction to prevent interference by the Wright defendants with the use of the Sawmill Canyon Road for access by paying hunters.

6. Charles F. Gillmor and Edward Leslie Gillmor are not entitled to modify the Decree of Partition in the partition

case, Civil No. 223998, to allow themselves access to their own Sawmill parcels by crossing plaintiff's parcel, nor are intervenor-defendants entitled to an easement by implication or necessity for such purpose.

7. Plaintiff is not liable to intervenor-defendants for trespass, nuisance, unjust enrichment or accounting.

8. Plaintiff's complaint, as amended, should be dismissed with prejudice.

9. The counterclaims of the intervenor-defendants, as amended, should be dismissed with prejudice.

10. No costs are awarded.

ENTERED this 17th day of May, 1989.

BY THE COURT:

/s/
MICHAEL R. MURPHY
District Court Judge

APPROVED AS TO FORM:

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JOHN B. WILSON
of and for
PARSONS, BEHLE & LATIMER
Attorneys for Plaintiff

Dated: 3-22-89

Dated: _____

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ATHAY & ASSOCIATES
Attorneys for Wright Defendants
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Dated: 3-22-89

R. STEPHEN MARSHALL
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MAILING CERTIFICATE

I hereby certify that I caused to be mailed, postage prepaid, 4 true and correct copies of the foregoing BRIEF OF APPELLANT SHIRLEY GILLMOR to each of the following on this 15th day of November, 1989:

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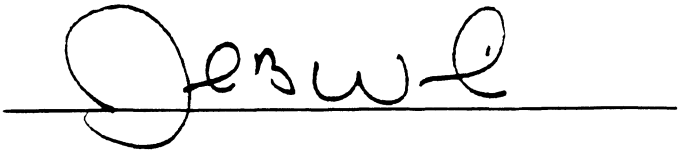

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